IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1274 OF 2005.

Narayan Doulu Kamble
r.o. Kerli, Tal: Karveer,
Dist: Kolhapur
..Petitioner

versus

1. Bharat Aba Kamble

2. Bajirao Aba Kamble

3. Smt. Laxmibai Aba Kamble

4. Miss Rani Aba Kamble

5. Sou Akkabai Vijay Kamble ..Respondents

Shri Amit Borkar for the petitioner
Shri D.S.Sawant for the respondent Nos.1 and 2

Coram : S.R.Sathe, J.
Dated : 6th Feb., 2006

P.C.

1. Petitioner, the original defendant whose application for amendment of written statement whereby he wanted to contend that he has become owner of the suit property by virtue of adverse possession was rejected by the learned District Judge, Kolhapur, by passing order below Exhibit 39 in Regular Civil Appeal No.57 of 2003, has filed the present petition. The petition is strongly opposed by the respondents-original plaintiffs. The facts giving rise to this appeal are as under :

2. Plaintiff Bharat Aba Kamble and Bajirao Kamble filed suit for recovery of possession on the basis of title against the defendants. The said suit was decreed in favour of plaintiffs. The defendants filed Regular Civil Appeal No.57 of 2003. In that appeal they submitted an application Exhibit 39 and prayed that though in the initial statement they had contended that they are the owners of the suit property, and the plaintiffs are not the owners, by virtue of amendment they want to contend that they have become owners by adverse possession. The said application was strongly opposed by the plaintiffs as according to them the defendants were taking new inconsistent stand.

3. After hearing the arguments of both the learned Advocates, the learned District Judge rejected the application for amendment. Being aggrieved by the same, the original defendant No.1 has filed the present writ petition. Shri Borkar, learned Advocate for the petitioner, original defendant No.1 submitted that amendment can be made at any stage of the suit. Appeal is continuation of suit and the defendant infact wants to take alternate plea that he has become the owner by

adverse possession. According to him, the party is entitled to take alternate inconsistent plea. In order to support this proposition, the learned Advocate has placed reliance on a case **G.Nagamma & Another vs. Siromanamma and another (19916) 2 SCC 25.** I have carefully gone through the said ruling. The facts of the said case and the facts of the case in hand are quite different. That was a case where plaintiff was seeking amendment in the plaint. Initially he had filed a suit for specific performance of agreement of reconveyance. By virtue of amendment he wanted to add and plead that as the agreement for reconveyance is embodied in the one and the same document he is entitled to get redemption of the mortgage. Such amendment was allowed by the Apex Court. It is pertinent to note that in the above mentioned reported rulings the plaintiff was in fact not making out any new case in the sense that initially he had based his claim on the basis of agreement of reconveyance. Only thing is that by virtue of amendment he wanted to plead that as the said agreement is embodied in the sale deed, the transaction was of mortgage. So, it cannot be said that the plaintiff was totally making out any new and inconsistent case. While, in the instant case we find that initially the defendant

had specifically contended that the plaintiff is not the owner of the property, the defendants are the owners. It is only after the time the decree for possession was passed against them in the appellate court by filing application for amendment the defendant wanted to contend that they have become owners by adverse possession. In fact they could have taken such alternate plea in the initial written statement but they had not done so. They had gone to the trial with a stand that the property is not owned by the plaintiff but it is owned by them. It is only after the time they lost the case in the trial court, they filed the amendment application and tried to take totally new inconsistent case. So, the above mentioned ruling is of no help to the present petitioner.

4. The learned Advocate for the petitioner has also placed reliance on a case **Akshaya Restaurant vs. P. Anjanappa and Another 1995 Supp(2) SCC 303.** The facts of this case are also quite different from the case in hand. It is very clear that in that case by virtue of amendment the defendant wanted to explain the nature of agreement entered into by them. So, in a way they only wanted to explain the transaction. It was not a totally new or

inconsistent with their earlier stand. While, in the instant case as already pointed out above the defendant tried to make a new and inconsistent case. So, this ruling is also of no use to the present petitioner.

5. From the perusal of the order passed by the learned District Judge, it is clear that he has taken into consideration all the facts and circumstances of the case and has rightly rejected the defendants application for amendment as by virtue of amendment he was trying to make out totally new and inconsistent case at appellate stage. There is no error of law in the order passed by the learned District Judge. The facts and circumstances of the case do not warrant interference of this court by exercising its power under the Constitution of India. There is no substance in this petition. Hence the petition is rejected.

(S.R.Sathe, J.)